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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 547

COMMONWEALTH TRUST COMPANY OF PITTSBURGH and J. KNOWLES WOODWELL, Executors of the Estate of John W. Herron, Deceased,
Petitioners,

v.

WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Commonwealth Trust Company of Pittsburgh and J. Knowles Woodwell, Executors of the Estate of John W. Herron, deceased, respectfully petition your Honorable Court that a Writ of Certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Third Circuit, entered July 9, 1943, affirming the judgment of the District Court of the

United States for the Western District of Pennsylvania, entered February 27, 1943, in favor of the Defendant-Respondent, and against the Plaintiff-Petitioners.

Opinions Below.

The opinion of the United States District Court is printed at pages 86 a to 92 a of the record, and is reported in 50 Fed. Supp. 949. The opinion of the Circuit Court of Appeals is printed in the record, (R. 102 a) It is a Per Curiam opinion and is reported in 137 Fed. (2d) 653 and reads as follows:

> "The judgment of the District Court is affirmed for the reasons sufficiently and satisfactorily given in the opinion of Judge Schoonmaker."

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered July 9, 1943. A petition for rehearing was filed July 24, 1943. Rehearing was denied September 20, 1943, and an order was entered on the same date.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

Statutes and Regulations Involved.

The statutes and regulations involved may be found in the appendix, *infra,* pp. 21-22.

Questions Presented.

1. Where a voluntary transfer of property is made by a decedent to his wife, can such transfer be conclusively presumed to have been made in contemplation of death solely upon the finding that in making such transfer it was decedent's intention to avoid estate tax, notwithstanding the fact the record shows the transfer was only 6.43% of decedent's estate, shows decedent was in good health and spirits and was active in business at the time the transfer was made, and contains various other facts evidencing that thoughts of life controlled his actions at that time?

2. Does a power to substitute securities at any time, reserved by the settlor of an irrevocable trust, created for the purpose of providing a competence for his two daughters, constitute such transfer one in which the enjoyment thereof was subject at the time of settlor's death, to a change through the exercise of a power to alter, amend or revoke, within the purview of Section 302(d) of the Revenue Act of 1926, as amended by Section 805 of the Revenue Act of 1936?

Statement.

Transfers of June 20, 1932.

On June 20, 1932, decedent caused to be transferred from himself and his wife, as tenants by the entireties, to his wife alone, the record title to two parcels of real estate, being respectively, the homestead property at Fifth Avenue and Clyde Street, Pittsburgh, Pennsylvania, and the family garage property on Winthrop Street, Pittsburgh, Pennsylvania. (R. 95 a).

Decedent had originally acquired the homestead

property in 1923 in part by purchase from the estate of his mother in 1906, in part by purchase from his sister in 1923, and in part by devise from his mother. (R. 95 a). He had caused the title to be transferred to himself and his wife, as tenants by the entireties, on April 14, 1924. (R. 95 a)

Decedent had originally acquired the garage property by purchase in 1901, (R. 95 a), and he caused the title to be transferred from himself to himself and his wife, as tenants by the entireties, June 17, 1932. (R. 95 a)

Decedent was eighty and one-half years old on June 20, 1932, at the time of the transfers in question. He had been President of the Commonwealth Trust Company of Pittsburgh from 1902 to 1923, when he became Chairman of its Board, which office he retained until his death on February 13, 1937. (R. 95 a, 96 a).

Until his last illness decedent maintained an office in the bank and was there almost daily. (R. 96 a). He was in constant contact with the officers of the bank, attended numerous committee and board meetings, never spoke or complained of illness and was mentally and physically active. He never spoke to the men with whom he was most closely associated, of death or fear of death or life after death. (R. 96 a). He was an active Trustee of the Mary E. Schenley Estate, and a director in various other companies. (R. 23 a).

The value of decedent's gross estate, as determined by the Commissioner, was $680,000.97. The value of the above described properties, transferred on June 20, 1932, represented only 6.43% of said gross estate, and 7.66% of the net estate for distribution. (R. 53 a-57 a).

Suit was filed by the taxpayer in the District Court of the United States for the Western District of Penn-

sylvania, to recover an alleged overpayment of Federal Estate tax and interest by reason of the Commissioner of Internal Revenue's erroneous inclusion in the gross estate of the decedent of the above mentioned properties at a valuation of $43,772.00, as a transfer made in contemplation of death. The District Court held that the transfers had been made in contemplation of death. (R. 90 a) In its opinion the District Court, after reviewing the facts held (R. 89 a), that the facts failed to prove that these particular properties were not transferred in contemplation of death. The opinion then states as follows:

> "On these facts we can draw no other conclusion than that the transfer was made with intention that these properties should not be liable for Federal Estate tax. If that is so, naturally the transfer must have been made in contemplation of death. This must have been the controlling motive that brought about the transfer of these properties to his wife alone."

TRANSFER OF NOVEMBER 18, 1922.

In the said suit filed by the taxpayer, the Government, by way of set-off, asserted that the value of a trust fund created by decedent on November 18, 1922, should have been included in decedent's gross estate, pursuant to Sec. 302 (d) of the Revenue Act of 1926 as amended.

The decedent for the purpose of providing a competence to his two daughters, transferred certain securities to a Trustee to collect the income therefrom and distribute it to them during their natural lives. The trust instrument contained the following provisions: (R. 97 a)

"The Settlor * * * does * * * herewith * * * deposit with the Trustee, the securities which are set forth in detail in a schedule attached hereto, made a part hereof and marked Exhibit "A", which said securities or substitutions therefor by the Settlor (the Settlor having the right to make any substitutions of securities from time to time as he deems advisable) * * *. The Settlor agrees that the Trustee shall not be held accountable or liable for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor, being held liable solely for such lawful trust investments as it may make and the proper application of the income therefrom."

Decedent reserved to himself no right or power whatsoever, other than the right of substitution. (R. 77 a-85 a, 97 a, 98 a). The securities deposited upon creation of the trust, as shown by Exhibit "A" attached to the trust instrument, (R. 81 a-85 a), consisted of $79,000.00 par value of bonds, $7,000.00 par value of stocks, and 150 shares of common stock without par value. Substitutions were made by decedent from time to time. The value of the securities substituted varied slightly, some having a value greater, some equal to, and some less than the value of the securities taken out. The substitutions as a whole resulted in a net gain of the sum of $2,010.00. (R. 34 a). The value of the trust at the date of decedent's death was the sum of $114,071.11. (R. 94 a)

The United States District Court held that the settlor had retained the right to make any substitutions he might desire, without restriction as to the kind or value of the securities substituted, and consequently

decedent had reserved the power to alter, amend or revoke the trust in that he had the right to change the value of the trust *res,* (R. 92 a), and to effectively terminate the trust. The value of said trust estate held to be includible in decedent's gross estate. (R. 98 a)

The judgment entered in favor of the defendant in the District Court (R. 99 a), was affirmed by the Circuit Court of Appeals on July 9, 1943. Plaintiff's petition for rehearing was denied September 20, 1943. (R. 100 a)

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals in affirming the judgment of the District Court for the Western District of Pennsylvania, that the transfers in 1932 were made in contemplation of death, conflicts in principle with the decisions of other Circuit Courts of Appeal, and applicable decisions of this Court, which have announced and adhered to the principle that the mere fact a settlor establishes a trust with the intention of making provision for his wife or children after his death, is not enough conclusively to establish such trust as made "in contemplation of death"; that something more than a mere showing that the settlor acted with regard to his ultimate death is required in order to show that a conveyance comes within the ambit of the statute. See *U.S. v. Wells,* 283 U.S. 102; *Colorado National Bank of Denver v. Commissioner,* 305 U.S. 23; *Blakeslee et al. v. Smith,* 110 F. (2d) 364, (C.C.A. 2).

The decision of the United States District Court, as affirmed by the Circuit Court of Appeals, makes a finding that the transfer in question was made "with intention that these properties should not be liable for

Federal Estate tax." (R. 89 a, 90 a) The opinion then makes the following comment: (R. 90 a)

> "If that is so, naturally the transfer must have been made in contemplation of death. This must have been the controlling motive that brought about the transfer of these properties to his wife alone."

It seems to be clear that the court's conclusion that the transfer was made in contemplation of death is considered as a compulsory one, solely because there was in the record evidence to justify the court's finding that *one* of the things motivating the transfer was decedent's desire to avoid Federal estate tax. It is the apparent position of the court that all the evidence in the record to the effect that the transfer constituted but a small part of decedent's estate, and that at the time decedent was in good health, cheerful and active in business, should be given no weight; that when it once appears that decedent made the transfer with the intention of avoiding Federal estate tax, and conserving the estate passing at his death, such motive must thereupon be accepted as the only motive.

It is important in the administration of the Revenue Acts, both to the Treasury Department and to taxpaying citizens, that this apparent conflict be clarified.

2. The decision of the Circuit Court of Appeals in affirming the judgment of the District Court for the Western District of Pennsylvania, appears to be in direct conflict with its own decision in the case of *Denniston v. Commissioner,* 106 F. (2d) 295, (C.C.A. 3) in which it was held that the desire or intention to avoid Estate taxes, *standing alone,* should not be deemed conclusive

of a mental state such as is contemplated by the statutory phrase "contemplation of death." The opinion of the United States District Court, as affirmed per curiam, makes no effort to distinguish the facts in the instant case from those in the *Denniston* case, or to point out why the principles set out in the *Denniston* case should not be applicable. A possible implication of the instant decision is that there is an affirmative duty on the petitioners to not only show facts evidencing the settlor's state of mind, sufficient to meet the prima facie correctness of the Commissioner's finding, but also to show affirmatively that a *particular* life purpose was in fact the *impelling motive* for the creation of the trust. The burden of proof placed upon the taxpayer does not go that far.

3. The decision of the United States District Court, as affirmed by the Circuit Court of Appeals, that decedent's irrevocable transfer in trust on November 18, 1922, was a transfer of property, the enjoyment of which at the time of his death, was subject to change through the exercise of a power by decedent to "alter, amend or revoke" in that decedent had reserved to himself the *power of substitution,* conflicts in principle with the decisions of other Circuit Courts of Appeals and applicable decisions of this court. The principle has been announced in various cases that a power reserved by the settlor of an irrevocable trust which affects the *"mere mechanics"* of the trust, is not the equivalent of a power to "alter, amend or revoke." *Dort v. Helvering,* 69 F. (2d) 836, Certiorari denied, 293 U. S. 569; *Commissioner v. Branch,* 114 F. (2d) 985 (C.C.A. 1).

The change contemplated by Section 302(d) of the Revenue Act of 1926, as amended, must affect the

economic benefits to be received by the beneficiaries, it must be a change in the trust instrument which affects the beneficiaries' rights of enjoyment of the trust *res*, the *quality* and *not the quantum of enjoyment*. *Reinecke v. Northern Trust Company*, 278 U. S. 339; *Commissioner v. Waterbury*, 97 F. (2d) 838, Certiorari denied 305 U. S. 638.

No other case has been found in which the power reserved to a settlor was the power of "substitution." The issue here raised is to that extent a new one, and your petitioners submit that the term "substitution" when it relates to trust property necessarily requires the substitution of property *of like kind and reasonably equivalent value*. Petitioners believe that the use of this term in numerous existing trusts and the general acceptance of its meaning as above defined, makes the matter one of interest and importance in the administration of the Revenue Acts, and both the Treasury Department and numerous taxpayers are entitled to clarification.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition should be granted.

W. A. SEIFERT,
WILLIAM WALLACE BOOTH,
PAUL E. HUTCHINSON,
Attorneys for Petitioners.

IN THE

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OCTOBER TERM, 1943.

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v.

WILLIAM DRISCOLL, Individually and as Former Collector of Internal Revenue for the Twenty-third Collection District of Pennsylvania.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinions below are reported and appear in the record as shown on page 2 of this Petition.

II.

Jurisdiction.

The Decision of the Circuit Court of Appeals and its Order affirming Judgment was filed July 9, 1943. A

petition for rehearing was filed July 24, 1943. Rehearing denied September 20, 1943, and an order entered on the same date.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (Sec. 347 of Title 28 USCA).

III.

Statement of the Case.

A summary statement of the case is contained in pages 3 to 7 of the Petition filed in this case.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In holding that the only motive for the transfers of property made by decedent in 1932 was to save Federal Estate taxes and that said transfers were therefore made in contemplation of death.

(2) In holding that because the transfers made by the decedent in 1932 were made with the intention of saving Federal Estate taxes, this must have been the sole and controlling motive and the transfers must have been made in contemplation of death.

(3) In holding that irrespective of donor's good health and business activities, and of other circumstances evidencing life motives and evidencing that thoughts of life motivated decedent's actions, the finding that the transfers were made with the intention of

avoiding liability for Federal estate taxes must be adopted as the controlling or only motive for said transfers.

(4) In holding that the right reserved to the settlor to make substitution of securities in the trust created on November 18, 1922, constituted the reservation of a power to "alter, amend or revoke" the trust instrument within the purview of Section 302(d) of the Revenue Act of 1926, as amended.

V.

Argument.

THE DECISION IN THIS CASE THAT THE TRANSFERS WERE MADE IN CONTEMPLATION OF DEATH, IS IN APPARENT CONFLICT WITH OTHER CIRCUIT COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

The Court's opinion is in apparent conflict with the applicable decisions of this Court and decisions of other Circuit Courts of Appeal on similar matters. It was stated by this Court in *Colorado National Bank of Denver v. Commissioner,* 305 U.S. 23, as follows: (p. 27)

"The court's opinion seems to rest upon an erroneous interpretation of the term 'in contemplation of death.' The meaning of this was much discussed in United States v. Wells, supra. We adhere to what was there said. The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more

than this is required in order to show that a conveyance comes within the ambit of the statute."

A transfer made with the intention of avoiding Federal Estate tax is an act taken with regard to ultimate death in the same sense as is a transfer of property made in lifetime with the intention of providing income for the donor's children after his death. This Court has therefore said with respect to such a transaction that something more must be shown in order to bring it "within the ambit of the statute."

This principle was relied upon and followed in the case of *Blakeslee et al. v. Smith,* 110 F. (2d) 364, (C.C.A. 2nd), in which the trial court found that the settlor, at the age of 73 years, was in good health, was vigorous and active, and that the transfers were not made in contemplation of death. The court said: (p. 366)

> "There being a substantial basis in the evidence for the finding that the settlor was actuated by considerations not flowing from the apprehension of death, the statute relied on is not applicable even though there was an intent to provide for the settlor's children after his death. Colorado Bank v. Commissioner, 305 U.S. 23, 59 S. Ct. 48, 83 L. ed. 20; See also, United States v. Wells, 283 U.S. 102, 51 S. Ct. 466, 75 L. ed. 867."

In *United States v. Wells,* 283 U.S. 102, this Court said at page 115:

> "It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive."

at page 117:

> "As a condition of body and mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death."

THE OPINION IN THIS CASE IS AT VARIANCE WITH THE PRINCIPLES ANNOUNCED IN *Denniston v. Commissioner,* 106 F. (2d) 295, (C.C.A. 3).

It is to be assumed that the Circuit Court of Appeals in this case did not intend to overrule its own decision in the case of *Denniston v. Commissioner, supra.* However, the present decision seems to completely ignore the principles there announced, as well as the principles of the case of *Colorado National Bank of Denver v. Commissioner, supra.*

The Circuit Court of Appeals for the Third Circuit, in *Denniston v. Commissioner, supra,* stated the question as follows: (p. 927)

> "The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death', within the meaning of Section 302 of the Revenue Act."

The answer of the court appears on page 928:

"We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'in contemplation of death'. The desire to avoid estate taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death.' "

* * * * * * *

"We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

The situation in the instant case is entirely analogous. The record shows that decedent, at the age of 80½ years transferred to his wife his interest in the homestead and garage properties which came to him and his sister by inheritance from their mother. (R. 95 a), and had theretofore been held by entireties. The value of these properties was only 6.43% of his gross estate, and 7.66% of the value of his estate at date of distribu-

tion. (R. 55 a-57 a). Neither property transferred was income producing, and following transfer decedent owned no other real estate except a vacant lot held for investment. (R. 36 a).

The transfers were made nine months before the decedent executed his Last Will and Testament and more than five years before his death. At the time of the transfers decedent was in good health, was active in business, was at his office almost daily, and was in constant contact with his business associates and others. Decedent never spoke of death or discussed such matters with his associates and was planning for the future and expected to outlive his father, who had died in his late nineties. (R. 13 a).

Such readjustment of the record ownership of his non-income producing home properties, whether for convenience of transfer or other personal life reasons is a common practice as frequently adopted by a young man as by an older man.

The present decision is, therefore, supported only by the finding that the transfers were made to avoid estate tax and under the authority of the *Denniston* case, *supra,* such motive, standing alone, is not sufficient to support an ultimate finding or conclusion that the transfers were made "in contemplation of death."

Motive depends on the decedent's state of mind and it may or may not have been communicated to others, and indeed, he may not even have analyzed for himself what his dominant purpose was in making a particular transfer. It is not the purpose of the law to place upon

the petitioner in this type of case a task or burden which is impossible of accomplishment. The maximum obligation of the petitioner is to show the Commissioner's determination to be erroneous. The presumption of correctness is not evidential in character. It is not a substitute for evidence of the character required in order to show that a conveyance or transfer comes within the ambit of the statute where substantial evidence to the contrary is present. *Heiner v. Donnan,* 285 U.S. 312; *Del Vecchio v. Bowers,* 296 U.S. 280; *N. Y. Life Insurance Company v. Gamer,* 303 U.S. 161.

THE DECISION OF THE CIRCUIT COURT THAT THE RIGHT TO SUBSTITUTE SECURITIES WAS EQUIVALENT TO THE RIGHT TO "ALTER, AMEND OR REVOKE," CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

There is a recognized line of cases holding that a power reserved to the settlor, the exercise of which affects the mere mechanics of an irrevocable trust, is not to be considered within the phrase "alter, amend or revoke" as used in Section 302(d) of the Revenue Act. *Dort v. Helvering,* 69 F. (2d) 836, Certiorari denied 293 U.S. 569; *Reinecke v. Northern Trust Company,* 278 U.S. 339.

The statute specifies only a power to *"change"* by alteration, amendment or revocation, the "enjoyment of the property." The cases have construed this "power" to mean that there must exist the right to change the economic benefits flowing to the beneficiaries. *Porter v. Commissioner,* 288 U.S. 436.

The power in question, therefore, must be at the least a power to *change the enjoyment* of the economic benefits flowing to the beneficiaries and if there is no "change" involved in the "substitution" of securities in an irrevocable trust set up for an express purpose, then the "power of substitution" is clearly not a power to "alter, amend or revoke" the trust instrument.

The purpose of the settlor in creating the trust is expressed therein as follows: (R. 77 a)

> "WHEREAS, the Settlor is *desirous* of providing a *competence for his two daughters* for and during the term of their natural lives with certain limitations thereon and is desirous of depositing with the Trustee certain *securities* and/or *monies* to carry out the purpose aforesaid; * * *" (Italics supplied).

The only possible substitution the trustee could accept would be of money or securities capable of providing the desired "competence". A court of equity would not permit other than an equitable substitution reasonably equivalent in character and value. The court's construction of the term "substitution" as potentially permitting the substitution for the benefit of the settlor rather than of the beneficiaries, is totally unwarranted.

Statutes levying taxes are not to be extended beyond the clear meaning of the terms used in the Act. *Old Colony R. Company v. Commissioner,* 284 U. S. 552, 560; *Renton Investment Company v. Commissioner,* 131 F. (2d) 330, (C.C.A. 3); *Gould v. Gould,* 245 U. S. 151.

Giving to the phrase "the right to make any substitution" its normal and intended meaning, it is apparent that such right would in no way affect the beneficiaries' enjoyment of the economic benefits of the trust and would be the equivalent of a power affecting merely the mechanics of the trust and not the quality of the beneficiaries' rights and enjoyment. Even if the opposite construction is accepted, a substitution would only affect the *quantity* of the beneficiaries' enjoyment in the sense that the corpus of the trust might thereby be increased or decreased. In the instant case the corpus of the trust was increased more than $2,000.00 by reason of the various substitutions . (R. 73 a)

Conclusion.

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

W. A. SEIFERT,
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APPENDIX.

Revenue Act of 1926:

Sec. 302. (As amended by Section 404 of the Revenue Act of 1934). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

Revenue Act of 1932:

Sec. 803. Future Interests.

(a) Section 302(c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof,

made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Revenue Act of 1936:

Sec. 805. Estate Taxes—Revocable Transfers.

(a) Section 302(d)(1) of the Revenue Act of 1926, as amended, is amended to read as follows:

"(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death."

(b) Except in the case of transfers made after the date of the enactment of this Act, no interest of the decedent of which he has made a transfer shall be included in the gross estate under such section 302(d)(1) unless it was includible under such section before its amendment by this section.





No. 547

In the Supreme Court of the United States

OCTOBER TERM, 1942

COMMONWEALTH TRUST COMPANY OF PITTSBURGH AND J. KNOX REED, EXECUTORS OF THE ESTATE OF JOHN W. HARPER, DECEASED, PETITIONERS,

v.

WILLIAM DRISCOLL, INTERNAL REVENUE AGENT IN CHARGE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 547

COMMONWEALTH TRUST COMPANY OF PITTSBURGH AND J. KNOWLES WOODWELL, EXECUTORS OF ESTATE OF JOHN W. HERRON, DECEASED, PETITIONERS

v.

WILLIAM DRISCOLL, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 86a–92a) is reported in 50 F. Supp. 949. The opinion of the Circuit Court of Appeals (R. 102a) is a *per curiam* affirmance, and is reported in 137 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 9, 1943 (R. 103a). A peti-

tion for rehearing was filed on July 24, 1943 (R. 104a–109a), and was denied on September 20, 1943 (R. 109a). The petition for a writ of certiorari was filed on December 18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the corpus of a trust created by the decedent in his lifetime, with respect to which he reserved an unlimited power to make substitutions of securities, was includible in the gross estate under Section 302 (d) of the Revenue Act of 1926, as amended.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in con-

> templation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

This section was amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, but not in any respect here material.

STATEMENT

This is an action to recover a claimed overpayment of federal estate tax upon the estate of John W. Herron, who died on February 13, 1937. The complaint alleged that there was erroneously included in the gross estate (1) so-called "interim income" [1] and (2) the value of two parcels of real estate which the decedent had conveyed to his wife prior to his death and which the Commissioner had determined were transfers made in contemplation of death. The complaint also alleged that proper credit had not been allowed the estate for Pennsylvania inheritance taxes. (R. 86a, 93a–94a.)

The Government admitted that the interim income had erroneously been included in the gross estate, but denied that there was any error in the inclusion of the two parcels of real estate which the decedent had transferred to his wife, and de-

[1] This represents income earned by the estate between the date of the decedent's death and the optional valuation dates on which the executors elected to value the gross estate, pursuant to Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935.

nied also that the taxpayers were entitled to any further credit for Pennsylvania inheritance taxes. By way of further defense the Government alleged that there had been a failure to include in the gross estate the value of a trust created by the decedent for the benefit of his daughters; that this trust was properly includible in the gross estate; and that even if it were assumed that the taxpayers were correct with respect to all of their claims, nevertheless there could be no recovery because the amount of tax attributable to the failure to include the trust in the gross estate was greater than the total amount of tax attributable to the claims made by the taxpayers. (R. 86c–87a.)

The case was tried by the District Court without a jury and the following findings of fact with respect to the trust property were made: The trust was created on November 18, 1922, on which date the decedent transferred certain securities to a trustee to collect the income therefrom and distribute it to his two daughters during their natural lives. The trust instrument contained a reservation by the decedent of (R. 97a) "the right to make any substitutions of securities from time to time as he deems advisable." And it was also specifically provided that (R. 97a)—

> the Trustee shall not be held accountable or liable for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor, being held liable solely for such lawful trust invest-

ments as it may make and the proper application of the income therefrom.

During the existence of the trust the decedent made many substitutions of securities, some of which were more, equal to, or less than the value of the securities taken out. The decedent also exercised control over the trust to the extent that he directed the purchase and actually purchased securities for the trust of a class not recognized as lawful for trust investments. A few months before his death the decedent relieved the trustee of any liability by reason of such investments. The right which the decedent had retained to make any substitutions in the securities held by the trust as he deemed advisable was without restriction as to the kind or value of the securities substituted, and the decedent had the right to alter, amend or revoke the trust by changing the value of the corpus. (R. 97a–98a.)

ARGUMENT

The courts below concluded that the trust property was includible in the gross estate under Section 302 (d) of the Revenue Act of 1926, *supra,* and since the inclusion of this property more than offsets all of the items claimed by the plaintiffs to have been erroneously included (see the District Court's conclusion of law, No. 5 (R. 99a)), it follows that unless the holdings below on this point are to be reversed, any other question in the case is of academic interest only.

Section 302 (d) requires the inclusion in a decedent's gross estate of the corpus of a trust created by him if the enjoyment thereof "was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke."

With respect to this branch of the case the only question involved is that of the proper construction of the trust; there is no issue with respect to the meaning of Section 302 (d). Positing the correctness of taxpayers' assertion that the section is applicable only where there has been reserved a right to change the economic benefits flowing to the beneficiaries (Pet. 9–10, Br. 18, 19), it is plain that such a right was reserved if, as the Government contended, the right reserved by the decedent to make "any substitutions of securities [in the trust] from time to time" (R. 97a) included the right to substitute securities of lesser value or of no value at all. Although taxpayers contended that this provision contemplated only the substitution of securities of equal value to those withdrawn, this question of construction the District Court resolved against them, concluding that there were no restrictions upon the right to make substitutions (R. 92a, 97a–98a). And the Circuit Court of Appeals accorded the trust a similar construction, since it affirmed the judgment for the reasons given by the District Court

(R. 102a). Thus the power reserved by the decedent was not unlike the reservation of a power by a settlor to purchase securities from the trust at his own price which, of course, is equivalent to a power to revoke. (See *Chandler* v. *Commissioner*, 119 F. 2d 623 (C. C. A. 3d).)

We think that the conclusion reached by the courts below as to the proper construction of this trust is the only sound conclusion which could be reached in view of the facts: (1) That the indenture itself imposed no restriction upon the power of substitution; (2) that it was carefully provided that the trustee was not to be liable (R. 97a) "for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor"; and (3) that the parties themselves evidently so construed the trust since the decedent had actually made some substitutions of securities of less value than those taken out. In any event, the proper construction of this trust is certainly not an issue calling for further review by this Court.

Since the issue of the includibility of the trust property in the gross estate under Section 302 (d) is dispositive of this case and since there is no basis for further review of that issue, it is not necessary to consider whether the transfers of the two parcels of realty were made in contemplation of death. However, it has long been settled that

the question whether a transfer was or was not made in contemplation of death is one of fact (*United States* v. *Wells*, 283 U. S. 102; *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *Colorado Bank* v. *Commissioner*, 305 U. S. 23), and there is ample evidence in the record to support the conclusion reached by the District Court that these transfers were made in contemplation of death.

CONCLUSION

The case was correctly decided by the courts below. There is no conflict and no question of general importance is presented. The petition should be denied.

Respectfully submitted.

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JANUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944